

did not know the character and source of the deposits made by the deputy registrar and would be liable in the first instance for any profits realized from the use of the moneys while on deposit. In view of the holding of the Supreme Court of Ohio in the case of *Bank v. The City of Newark*, 96 O. S. 453, this conclusion seems inescapable. Whether or not any profits were realized by the bank is a question of fact which, from the information at hand, I am unable to determine. Whether any profits were realized by the bank or not by reason of carrying this account it would be equally liable with the secretary of state if in fact it is determined that the secretary of state is liable for any interest by reason of his failure to deposit the moneys coming into his hands as secretary of state in the state treasury in compliance with the law.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

548.

COUNCIL OF CITY OR VILLAGE—AUTHORITY TO FIX SALARY OF  
JUSTICE OF THE PEACE.

SYLLABUS:

*When the corporate limits of a city or village have become identical with those of a township and the council of the city or village has by ordinance fixed the amount of compensation to be paid to a justice of the peace, elected within the township, as the amount of fees taxed and collected by said justice of the peace in the hearing of state cases, the council of said municipality may subsequently change the amount of compensation to be paid to said justices of the peace by the enactment of an ordinance providing for the payment to the justice of the peace of a definitely fixed salary.*

COLUMBUS, OHIO, May 28, 1927.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your communication, in which after quoting sections 3512 and 4219, General Code, you request my opinion as follows:

“The corporate limits of the village of———are identical with those of the township and council by ordinance, passed some years ago provided that the compensation of the justice of the peace should be the fees taxed and collected in state cases tried before him. On March 27, 1927, this ordinance was repealed and the compensation of the justice of the peace was fixed by ordinance at \$100.00 per month with the further provision that all fees collected are payable into the village treasury, presumably the fees to be deposited will equal the compensation of the justice.

QUESTION: May the compensation of the justice of the peace in question be definitely fixed in this manner during his term of office since the result might be an increase or decrease over the amount of fees formerly received?”

In your communication you have suggested the applicability of the provisions of sections 3512 and 4219, General Code, which read as follows:

“Sec. 3512. When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of

the city or village, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests or claims in favor of or against the township may be enforced by or against the corporation."

"Sec. 4219. Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

The office of justice of the peace was a constitutional office prior to the adoption of the amendments to the Constitution of Ohio in 1912. The purport of these amendments was to abolish the office of justice of the peace as a constitutional office. The legislature, however, by virtue of the power vested in them as provided in Article IV, Section 1 of the Constitution as amended, to establish by law such courts inferior to courts of appeals as might be necessary, enacted section 1711-1 establishing the office of justice of the peace in each of the several townships in the several counties of the state, except townships in which a court other than the mayor's court then existed or wherein courts might thereafter be created having jurisdiction in all cases in which justices of the peace have or may have jurisdiction.

The office of justice of the peace being a part of the judicial system of the state is a state office created within a township and, when the corporate limits of a city or village become identical with those of a township, the justice of the peace continues as such officer. He does not become a village or city officer. The legislature has provided that the justice of the peace shall exercise the functions of his office under municipal ordinances but this does not constitute him a municipal officer and in my opinion the provisions of Section 4219, supra, have no application to the office of justice of the peace or the incumbent thereof.

But even though the provisions of Section 4219, supra, do not apply to justices of the peace there are other provisions of law by which it is provided that the salary of a justice of the peace may not be changed during his term of office. The Constitution of Ohio, Section 20, Article II thereof, reads as follows:

"The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall effect the salary of any officer during his existing term, unless the office be abolished."

In so far as the justice of the peace is concerned the General Assembly delegated to the council of the municipality the power to regulate the compensation of a justice of the peace in cases such as you have inquired about and it might be contended that having thus delegated the power and not having said anything with reference to increasing the compensation of such justice of the peace during his term of office it might be presumed that the legislature did not intend to deny the municipal council the right subsequently to change any compensation theretofore fixed.

This contention, however, would be untenable in the light of the decision of the case of *State ex rel. v. Cook, Auditor*, 103 O. S. 465, in which it was held that the board

of education could not increase the salary of a county superintendent of schools during his term for which he had been appointed. In the course of the opinion of this case it is said:

"It can not be seriously doubted, however, that what the constitution reads into every statute it is quite unnecessary that the legislature should expressly write into the statute. Upon the contrary, unless the language of the statute is clearly inconsistent therewith, the presence of such constitutional provision is as necessarily implied in the statute as if the same were expressly written into it."

Beyond question a justice of the peace is an officer within the meaning of the term as used in the constitution wherein it is provided that the salary of no officer shall be changed during his existing term of office and it therefore follows that the municipal council of the village to which you refer could not change the salary of a justice of the peace during his term of office.

It will be noted that Section 3512, *supra*, provides that council may regulate the *compensation* of a justice of the peace while the constitutional provision referred to provides that the *salary* of an officer during his existing term shall not be changed. The words *salary* and *compensation* are not synonymous. Salary is always compensation, but compensation does not necessarily mean salary as the courts have said in a number of instances. Compensation may be salary, wages, hire, allowance, damages or a number of other kinds of remuneration. Webster defines salary to be: "The recompense or consideration stipulated to be paid to a person for services; annual or periodical wages—pay or hire." The Century Dictionary defines salary to be: "The recompense or consideration stipulated to be paid to a person periodically for services." Salary has been defined in Bouvier's Law Dictionary: "The reward paid to a public officer for the performance of his official duties." The Standard Dictionary defines compensation as: "Pecuniary amends for loss, privation or injury." The same dictionary defines salary to be: "Periodical allowance made as compensation for regular work."

Salary has also been defined as a fixed annual or periodical payment for services depending upon the time and not the amount of services rendered. *Thompson vs. Phillips*, 12 O. S. 117. Many similar definitions may be found in the reported decisions of courts. In an opinion rendered by the Attorney General reported in the Opinions, Attorney General, 1918, Vol. II, page 1034, it is said:

"Salary is incidental to the office and not to the performance of the duties of the same. Hence, so long as an officer does not resign, die or is removed he is entitled to the salary pertaining to the office."

And again, in Opinions, Attorney General, 1918, Vol. II, page 1565, may be found an opinion, the syllabus of which reads as follows:

"The provisions of Section 20, of Article II of the Constitution do not apply to members of the board of deputy state supervisors of elections and they can draw the increased compensation as provided for in Section 4943, General Code, (107 O. L. 684) even though they were holding office at the time said amendment became effective for the reason that they do not draw a salary as therein contemplated but merely compensation."

A case in point is the case of *Gobrecht vs Cincinnati*, 51 O. S. 68, the syllabus of which reads as follows:

"1. Compensation of a public officer fixed by a provision that 'each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive \$5.00 for his attendance,' is not 'salary' within the meaning of Section 20, of Article II of the Constitution, which provides that 'the general assembly, in cases not provided for in this constitution, shall fix the term of office, and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.'

2. An increase in the compensation of such officer during his term is not prohibited by the constitution."

In the course of the opinion in this case, Judge Spear said:

"(a) Can the compensation of members of the board of legislation be increased during the existing term? \* \* \*

At the commencement of the term of plaintiff as a member of the board of legislation the compensation provided by statute was five dollars for attendance during the entire session of any regular meeting. By the act of February 19, 1892, it was provided that 'each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive ten dollars for his attendance, and shall receive no other compensation whatever.'

1. It is contended that Section 20, of Article II, of the Constitution, prohibits an increase of compensation during the existing term. That section is as follows: 'The general assembly, in cases not provided for in this constitution, shall fix the term of office, and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.'

The question, therefore, is whether or not the pay of a member of the board is 'salary' within the meaning of the above section?

We think it is not. A general definition of salary includes compensation. General definitions do not, however, cover all cases. Salary is compensation, but, under the section quoted, compensation is not, in every instance, salary. The point is emphasized by this court in the case of *Thompson vs. Phillips*, 12 Ohio St., 617, where it is said that "it is manifest from the change of expression in the two clauses of the section that the word "salary" was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense, of an annual or periodical payment for services—a payment dependent on the time and not on the amount of the services rendered.' And it was there held that a percentage compensation allowed by law to a public treasurer for official duties, could be altered during his term. It is the 'salary' which shall not be changed during the term, not necessarily, the compensation.

We think the compensation in the case at bar comes within the principle of the case cited, although a per diem compensation. It is not within the meaning of the section quoted, 'salary'."

In the case of *Theobald vs. State of Ohio*, 10 O. C. C. (N. S.) 175, the headnote reads as follows:

"A salary is a determined and stipulated sum to be paid for a fixed period. Officers receiving their compensation under a fee system are not salaried officers and a change in the method of compensation from fees to a salary is not a change which 'affects the salary of any officer during his existing term'."

To the same effect is the case of *State, ex rel. vs. Commissioners*, 13 O. D. (N. P.) 97.

In the light of these cases it seems clear that the compensation which had been provided for the justice of the peace about which you inquire could not be considered as a salary within the meaning of Article II, Section 20 of the Constitution of Ohio, and it is therefore my opinion that the council may provide a stated fixed salary for such justice and it would not be changing his salary as prohibited by the Constitution of Ohio.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

549.

WORKMEN'S COMPENSATION LAW—CHAUFFEURS, GARDENERS AND  
HOUSEHOLD SERVANTS NOT "EMPLOYES" WITHIN MEANING OF  
ACT.

SYLLABUS:

*Chauffeurs, gardeners and household servants employed solely to render services in connection with the maintenance of a private dwelling are not "employees" within the meaning of the workmen's compensation law of this state.*

COLUMBUS, OHIO, May 31, 1927.

HON. WILLIAM C. SAFFORD, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your request for my opinion as follows:

"An insurance agent of Cleveland, Ohio, maintains that a former Attorney General of Ohio rendered an opinion setting forth that domestic servants were excluded from the operation of the Workmen's Compensation Law.

My remembrance is that our correspondent has a client owning a country estate, upon which are employed chauffeurs, gardeners and household servants, and he believes such persons do not come within the provisions of the Workmen's Compensation Law, as administered by the state of Ohio.

Will you inform us in this matter at your convenience?"

From a personal interview with you I am informed that you wish to know whether chauffeurs, gardeners and household servants who are employed at the employer's private residence and only perform services in connection therewith are "employees" within the meaning of the workmen's compensation law of this state.

Section 1465-61 of the General Code defines who are "employees" within the meaning of said law, and in so far as it applies to the question before us reads as follows:

"The terms 'employee', 'workman' and 'operative' as used in this act, shall be construed to mean:

\* \* \* \* \*

2. Every person in the service of any person, firm or private corporation, including any public service corporation, employing three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, but not including any person whose employment